Decision **DRAFT DECISION OF ALJ VIETH** (Mailed 1/12/2006)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

The City of St. Helena, Town of Yountville, County of Napa, Napa Valley Vintners Association, Complainants, vs. Napa Valley Wine Train, Inc., Defendant.	Case 88-03-016 (Filed March 7, 1988)

OPINION DENYING PETITION FOR MODIFICATION AND CLOSING PROCEEDING

Summary

We deny the Petition for Modification (Petition) filed by the Napa Valley Wine Train, Inc. (Wine Train) and close this proceeding, which has been closed and reopened several times since 1988. Following upon decisions by the Court of Appeal and the California Supreme Court, today's order denying the Petition leaves standing Decision (D.) 01-06-034 (2001 Cal PUC LEXIS 407), in which the Commission determined that Wine Train's excursion service is not a public utility service. We conclude that the recent decision of the California Supreme Court, *Gomez v. Superior Court of Los Angeles* ((June 16, 2005) 2005 Cal. LEXIS 6557) does not require a different result, as it concerns whether an entity is

a "carrier of persons for reward" under § 2100 and § 2101 of the Civil Code, not whether that entity is subject to regulation as a public utility under the Public Utilities Code.

Background and Procedural History

We do not repeat the long and complicated history of this proceeding, which chronicles the troubled relations between Wine Train and the City of St. Helena (St. Helena) over nearly two decades.[1] As relevant here, a decision of the Court of Appeal, filed on June 21, 2004, annulled two Commission decisions filed in this proceeding and two filed in another proceeding (which is already closed) "to the extent they deem the Wine Train a common carrier providing transportation subject to regulation as a public utility." (*City of St. Helena v. PUC*, 119 Cal. App. 4th 793, 2004 Cal. App. LEXIS 970, as modified by 2004 Cal. App. LEXIS 1149.) The California Supreme Court denied review. (*City of St Helena v. PUC* ((Sept. 29, 2004) 2004 Cal. LEXIS 9468.)

The two annulled decisions, which originated in this proceeding, are:

- D.03-01-042 (2003 Cal. PUC LEXIS 13), which granted rehearing of D.01-06-034 and reversed that decision. D.03-01-042 determined that the Wine Train is a public utility.
- D.03-10-024 (2003 Cal. PUC LEXIS 631), which denied rehearing of D03-01-042.[2]

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[1] Two prior decisions, D.99-08-018 and D.03-01-042, contain recitations of the procedural and substantive developments.

[2] The other two annulled decisions were filed in Case (C.) 99-01-020, a separate proceeding, now closed. They are:

- D.99-08-018, in which the Commission dismissed the complaint on the basis that it sought an advisory opinion; and

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The effect of the annulment of these decisions is that D.01-06-034 remains the controlling Commission case law. D.01-06-034 (which, itself, modified two earlier decisions) determined that the Wine Train's passenger excursion service (sight-seeing and dining during a two hour or more round trip journey between Napa and St. Helena) is not a public utility service.

On July 7, 2005, the assigned Administrative Law Judge (ALJ) mailed a brief draft decision for comment. The draft decision proposed that the Commission close this proceeding and stated: "Because there is no further action for us to take, there is no reason for this proceeding to remain open." (Draft decision, p. 1.) Wine Train filed comments opposing the draft decision on July 27 and, on July 29, filed a petition for modification of D.01-06-034. Thereafter, the Commission withdrew the July 7 draft decision from its public meeting agenda. Following substitution of counsel for St. Helena on September 8, and pursuant to an extension of time granted by the ALJ, St. Helena filed a response to the Petition on September 29 and Wine Train filed a reply on October 11, 2005.

Relief Sought by Wine Train

Wine Train's Petition asserts that D.01-06-034 must be modified and revised to reach the conclusion that the Wine Train *is* a public utility providing common carrier transportation services because the contrary determination "has been rendered unlawful by subsequent factual and legal developments." (Petition, p. 1.) Wine Train ties its legal claim to *Gomez*, the California Supreme

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- D.03-10-025, which denied rehearing of D.99-08-020.

Nothing in the decision of the Court of Appeal requires us to reopen C.99-01-020.

Court's recent decision on common carrier tort liability. Wine Train supports its factual claim with the declaration of its President, Vince DeDomenico, Sr. (DeDomenico), which states that the train's services have expanded since the issuance of D.01-06-034 to include the daily disembarkation of passengers for winery tours at two locations along the train's route. DeDomenico's declaration is Attachment A to the Petition. Attachment B to the Petition lists the deletions and additions Wine Train seeks to D.01-06-034's Findings of Fact, Conclusions of Law and Ordering Paragraphs.

Rule 47 of the Commission's Rules of Practice and Procedure governs petitions for modification of issued decisions. As relevant here, Rule 47(b) requires a petitioner to support, by declaration or affidavit, allegations of new or changed facts that warrant the relief requested. Rule 47(d) provides that a petition generally must be filed within one year of the effective date of the decision that the petitioner wishes us to modify; if more than a year has passed, the petition must explain the reason for the delay. Wine Train has complied with the procedural requirements of Rule 47. We consider the merits of Wine Train's claims below.

Discussion

The Commission described the crux of the parties' dispute in D.01-06-034. At issue are the condemnation rights a public utility may exercise to site and construct infrastructure and, thus in this case,

> … whether Wine Train may build a station, over St. Helena's objection, near the site of the railroad turn-around Wine Train uses at present at the southern end of St. Helena's downtown district. Specifically, Wine Train wants to construct a passenger loading platform, bathroom facilities, and a parking lot for ten cars and four buses so that it can begin disembarking and boarding passengers in St. Helena. (D.01-06-034, slip op., p. 4.)

If Wine Train is a public utility, it has rights that a private entity does not and those rights may influence whether a station is built in St. Helena or not.

Gomez Does Not Require a Determination That Wine Train Is a Public Utility

Gomez holds that "the operator of a roller coaster or similar amusement park ride can be a carrier of persons for reward within the meaning of Civil Code §§ 2100 and 2101." (*Gomez* 2005 Cal. LEXIS 6557 *3 and *38.) The opening paragraph of the California Supreme Court's opinion summarizes the facts of *Gomez*, the Civil Code statutes at issue, and the proceedings in the lower courts:

> The estate of a passenger who died as a result of injuries allegedly sustained while riding on the Indiana Jones attraction at Disneyland brought causes of action based upon Civil Code section 2100, which requires a "carrier of persons for reward" to "use the utmost care and diligence" for the safety of its passengers, and Civil Code section 2101, which imposes a duty upon such a carrier to provide "vehicles" that are "safe and fit for the purposes to which they are put." The superior court sustained a demurrer to these causes of action, reasoning that the operator of an amusement park ride cannot be a carrier of persons, but the Court of Appeal reversed. (*Id*. at *3.)

The *Gomez* Court notes that California law has long recognized recreational rides as common carriers[3] and upheld an expansive definition of carriers of persons for reward,[4] imposing on them a heightened duty of care

[3] The Court points to *McIntyre v. Smoke Tree Ranch Stables*, 205 Cal. App. 2d 489, 1962 Cal. App. LEXIS 2155 [operator of a mule train that took passengers on a round trip, scenic journey and back, was a common carrier and thus, required to exercise the utmost care toward passengers].

[4] The Court cites cases spanning from 1889 to the present: *Treadwell v. Whittier* (1889) 80 Cal. 574, 585 [operators of a hydraulic elevator are carriers of passengers, with same

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toward the passengers they carry, which is codified in Civil Code § 2100.[5] The Court pointedly rejects defendant Disney's argument that an amusement ride within a single building is not transportation within the context of the Civil Code.[6] Citing *Smith v. O'Donnell* (see footnote 4, above) the Court states:

> [W]e long ago rejected such a limited interpretation of "from one place to another" by including within the definition of carriage of persons for reward a sight-seeing airplane ride that took off and landed at the same airport. (*Smith v. O'Donnell*, supra, 215 Cal. 714.) The circumstances that a passenger begins and ends a journey in the same place does not mean he or she has not been transported. A tourist in San Francisco who takes a round trip ride on a cable car solely for entertainment has been transported and is not less entitled to a safe ride than another passenger on the same cable car who disembarks earlier to visit a store or restaurant. (*Gomez* 2005 Cal. LEXIS 6557 *29.)

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responsibilities as to care and diligence as carriers of passengers by stage-coach or railway]; *Smith v. O'Donnell* (1932) 215 Cal. 714, 716 [airline pilot who offered sightseeing flights to the ocean and back was a carrier of passengers for reward]; *Barr v. Venice Giant Dipper Co., Ltd.* (1934) 138 Cal. App. 563, 564 [owner and operator of a roller coaster designed to look like a miniature scenic railway was subject to liabilities of a carrier of passengers under Civ. Code § 2100]; *Kohl v. Disneyland, Inc.* (1962) 201 Cal. App. 2d 780, 784 [operators of a stage coach ride, because of the passenger-carrier relationship, had a duty to exercise the utmost care and diligence]; *Neubauer v. Disneyland, Inc.* (C.D.Cal. 1995) 875 F. Supp. 672, 674 [Disneyland's amusement boat ride falls within California's broad statutory definition of a common carrier, which imposes the duty of utmost care and diligence on Disneyland].

[5] Civil Code § 2100 provides: "A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill."

[6] Civil Code § 2085 defines a contract of carriage within the Civil Code's statutory framework (which includes § 2100 and § 2101) as "a contract for the conveyance of property, persons, or messages, from one place to another."

The Court's discussion of "transportation" is central to Wine Train's Petition, since the Court goes on to distinguish *Gomez* from *Golden Gate Scenic Steamship Lines, Inc. v. PUC,* 57 Cal. 2d 373, 1962 Cal. PUC LEXIS 181. *Golden Gate* concerned the jurisdiction of this Commission under Pub. Util. Code § 1007, rather than the meaning of Civil Code §§ 2100 and 2101, particularly, whether a boat carrying round trip, sight-seeing passengers on San Francisco Bay was obliged to obtain a certificate of public convenience and necessity from the Commission. *Golden Gate* held that it did not, because round trip sight-seeing (leaving from and returning to the same wharf) was not operation of a vessel for transportation under § 1007, which requires movement "between points in this state." (Pub. Util. Code § 1007.) This requirement means "there must be two or more ends-of-the line, stations, towns, or places between which the vessel operated." (*Gomez* 2005 Cal. LEXIS 6557 *34, quoting *Golden Gate*, 57 Cal. 2d at 380.) Moreover, "Public Utilities Code section 1007 is part of a regulatory regime for transportation, the purpose of which is distinct from the liability standard for carriers of persons for reward, which is set forth in the Civil Code." (*Gomez*, *Ibid*.)

Had the Court stopped here, we think Wine Train would be sorely remiss to rely on *Gomez* for the proposition that the Wine Train is a public utility. As it is, we think Wine Train misinterprets *Gomez*, for the Court then stated:

> The Court of Appeal in *City of St. Helena v. Public Utilities Commission* (2004) 119 Cal. App. 4th 793 [14 Cal. Rptr. 3d 713] gave an overly expansive reading to our decision in *Golden Gate*, *supra*, 57 Cal. 2d 373, concluding that our "definition of 'transportation' was not confined to section 1007; rather it was in accord with the word's ordinary meaning." (*City of St. Helena v. Public Utilities Commission*, *supra*, 119 Cal. App. 4th at p. 802.) *City of St. Helena* held that the Wine Train, which provided a round trip excursion through the

> wine country in Napa Valley, was not subject to regulation as a public utility because it "does not qualify as a common carrier providing transportation." (*Id.* at p. 796.) In reaching that conclusion, the Court of Appeal did not discuss or attempt to distinguish our decision in *Smith v. O'Donnell*, *supra*, 215 Cal. 714, or the Court of Appeal's decision in *McIntyre v. Smoke Tree Ranch Stables*, *supra*, 205 Cal. App. 2d 489. **We express no view on whether the Court of Appeal was correct that the Wine Train is not subject to regulation as a public utility**, but we disapprove the decision in *City of St. Helena v. Public Utilities Commission*, *supra*, 119 Cal. App. 4th 793, to the extent it suggests that, in general, a provider to the public of roundtrip sight-seeing excursions is not a carrier of persons for reward. (*Gomez*, 2005 Cal. LEXIS 6557 *35, emphasis added.)

Wine Train argues that the partial disapproval of the 2004 Court of Appeal's decision establishes that *Gomez* "directly repudiates" the conclusion in D.01-06-034 "that a roundtrip excursion is not public utility transportation." (Petition, p. 9.) But *Gomez* does not go so far. *Gomez* expressly limits its application to Civil Code liability for safe carriage. It nowhere suggests that the term "transportation" must be defined identically for the disparate purposes of tort liability under the Civil Code and rates and services regulation under the Public Utilities Code. In fact, the Court points directly to one situation where the Civil Code applies and the Public Utilities Code does not, *Squaw Valley Ski Corp. v. Superior Court* (1992) 2 Cal. App 4th 1499. The Court summarizes the holding of *Squaw Valley* thus: "operators of ski lifts are common carriers under Civil Code section 2186 despite Public Utilities Code section 212, which exempts ski lifts from the definition of "common carrier" for purposes of regulation by the Public Utilities Commission." (*Gomez*, 2005 Cal. LEXIS 6557 *34.)

Though as *Gomez* states, the 2004 Court of Appeal's decision does not discuss either *Smith v. O'Donnell* or *McIntyre v. Smoke Tree Ranch Stables*, we do not think that either requires the conclusion that Wine Train's excursion service

should be regulated under the Public Utilities Code. In *Smith v. O'Donnell*, the central issue was the standard of care due under the Civil Code to passengers whom the pilot of a small airplane flew "[u]p and down the road toward the ocean" from a field nearby. (*Smith v. O'Donnell*, 1932 Cal. LEXIS 477, **934.) The Court held that within the framework of the Civil Code, the airplane trip was common carriage and the injured person was a passenger, entitled to expect that the "utmost care and diligence" would be exercised for his safe carriage. (*Ibid*. *722.)

Likewise, in *McIntyre v. Smoke Tree Ranch Stables*, the central issue was the standard of care owed to persons who paid to take a scenic, round-trip mule train tour. The Court of Appeal determined that since a mule train was a common carrier, the trial court erred in refusing to give jury "instructions applying the utmost care standard." (*McIntyre v. Smoke Tree Ranch*, 1962 Cal. App. LEXIS 2155, ***10.)

We conclude that Wine Train misreads the import of *Gomez*. Though questions about Wine Train's common carrier status for the purposes of Civil Code tort liability are beyond our jurisdiction, *Gomez* strongly suggests how the Court would view such questions. *Gomez* does not require us to reverse our determination that Wine Train's excursion service is not the kind of transportation that requires rate and service regulation under the Public Utilities Code.

The Alleged "New Facts" Do Not Require Modification of D.01-06-034

DeDomenico's declaration consists largely of a brief chronology of events and legal developments to date, followed by assertions that Wine Train's excursion services are popular, and bring economic and air quality benefits to the

Napa Valley. For example, paragraph 7 states: "The consistently high quality of Wine Train operations attracts thousands of visitors annually, both domestically and internationally, providing substantial economic benefits to the Napa Valley community." (Petition, Attachment A.)

Paragraph 11 provides, in part: "We firmly believe that our operations are a matter of statewide concern and contribute significantly to the public interests in both economic and environmental respects, particularly with respect to Wine Train's contribution to the reduction of traffic congestions on Highway 29." (*Ibid*.)

Two paragraphs describe the two points, other than the Napa station, where passengers may now disembark:

> 8. Subsequent to the date of issuance of D.01-06-034, Wine Train, in addition to its roundtrip passenger excursion service, introduced passenger service between Napa and Yountville. On a daily basis, passengers embark at Napa, disembark at Yountville, board another common carrier to be transported to a tour of the Domain Chandon Winery, and then return to Wine Trains' McKinstry Street Depot in Napa.
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> 9. On a daily basis, Wine Train passengers, embarking at Napa, disembark at Grgich Hills Winery (near Rutherford) and then, one hour later, re-board the Wine Train to transportation to the McKinstry Street Depot to retrieve their automobiles. (*Ibid*.)

We need not repeat D.01-06-034's analysis of Wine Train's service or the governing law and precedent. The fact that Wine Train passengers now have additional sight-seeing options does not establish that Wine Train is a public utility engaged in transportation that should be regulated under the Public Utilities Code. We see no need to modify D.01-06-034. As we advised in that decision, if Wine Train determines to offer transportation other than sighting

excursions, such transportation may well fall within the Public Utilities Code's dominion. Wine Train may then file an application for a certificate of public convenience and necessity with this Commission.

Comments on Draft Decision

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Section 311(g)(1) of the Public Utilities Code and Rule 77.7 of the Rules of Practice and Procedure. Comments on such draft decisions may be filed in accordance with Rule 77.7. Wine Train filed comments on February 1, 2006 and St. Helena filed a reply on February 6.

We make no substantive change to the draft decision in response to the comments. Wine Train essentially reargues the assertions made in its Petition, arguments that urge us to go further than *Gomez* requires. Quite simply, the fact that an entity is a "carrier of persons for reward" under the Civil Code does not make that entity a public utility.

Assignment of Proceeding

Dian M. Grueneich is the Assigned Commissioner and Jean Vieth is the assigned ALJ in this proceeding.

Finding of Fact

Compared to the operations of Wine Train as they existed when D.01-06-034 was issued, Wine Train passengers now have two additional sight-seeing options.

Conclusions of Law

1. *Gomez* concerns common carrier tort liability under the Civil Code and does not invalidate D.01-06-034.

2. The "new facts" alleged in Attachment A to the Petition, viz., that Wine Train passengers now have additional sight-seeing options, are not material changes for purposes of the conclusion in D.01-06-034 that Wine Train's service is not a public utility service. Consequently, the "new facts" do not require modification of D.01-06-034.

3. Following the annulment of D.03-01-042 and D.03-10-024, D.01-06-034 remains the controlling Commission case law.

4. No hearings are necessary.

5. To afford certainty in the business dealings of the parties and other interested persons and entities, this proceeding should be closed, effective immediately.

O R D E R

IT IS ORDERED that:

1. The Petition for Modification of Napa Valley Wine Train, Inc., filed July 29, 2005, is denied.

2. Decision (D.) 01-06-034 remains in effect, following the annulment of D.03-01-042 and D.03-10-024.

3. Case 88-03-016 is closed.

This order is effective today.

Dated _____, at San Francisco, California.